MISCELLANY.

Outlawry.—The recent threat of the British Government against the Bolshevik Government at Moscow to hold the members of the latter Government individually responsible unless prompt punishment and reparation follow the outrageous attack upon the British Embassy at Petrograd on August 31st, wherein the gallant Captain Cromie lost his life, and, to quote the language of the official dispatch, 'to use every endeavor to have them treated as outlaws by the Governments of all civilized nations, and that no place of refuge shall be left to them,'—is interesting as illustrating in a vivid way the fact, often observed upon, that the society of independent nations at the present day resembles in many ways the conditions of all early communities, before law and order were fully established. In the absence of any international Court with power at its disposal to hale offending members of foreign Governments before it, and administer punishment, the last resort is outlawry, just as outlawry was the last weapon of ancient law. As has been well said, it was the sentence of death pronounced by a community which had no police constables or professional hangmen. To pursue the outlaw, to knock him on the head as though he were a wild beast, this is the right and duty of every law-abiding man. Caput gerat lupinum,—Let him bear a wolf's head,—this phrase was in use even in the 13th century. The near future may show whether a League of Nations is possible, which may entirely change this aspect of the international relations of the world.—The Canadian Law Times.

A Texas Lawyer on Human Happiness, Marriage and Divorce.—The following is from the brief of attorney J. W. Allen as reported in Wright *v.* Wright, 6 Tex. 3, decided in 1851:

"Human happiness is the chief end of human existence. It is the will of God, as indicated by the mental, moral and physical constitution of man, and his position in the scale of creation, and, as we are plainly taught in His revealed word, it is the great object of all political and social organizations. In all the various stations of social life there is not one that does not profess to be promotive to this great end. Among them all the marriage relations occupies, by the common consent of mankind, and by the human and Divine law, the post of honor, as being more promotive than any other of the highest happiness of the individual. Man, then, was not made that he might marry, but made that he might be happy. Happiness is the great end, and marriage only the means. Listening to some of the modern rhodomontades upon the indissolubility of the marriage relation, one would suppose that the Bible and the common

sense of mankind had been all along wrong, and that man's chief end is to marry; and that all other things are to be sacrificed in order that this relation may be maintained indissoluble.

"The individual is under the highest possible moral obligation to pursue his substantial happiness. He has no moral right to wantonly mar that happiness, whilst he cannot promote it at the sacrifice of the right or happiness of others; yet he is bound to pursue it in despite of all hindrances when those hindrances are neither the result of his own culpability nor of such a character as to render obedience to them of higher moral obligation. From these principles, that as the marriage relation is only the means to attain the end, individual happiness, whenever it ceases to be promotive of that end and entails misery, and that without the fault of the suffering party, it should, in pure morality, be dissolved. I admit the obligations to society, and am willing to give them due force; but society becomes a tyrant, whose exacting behests transcend the rules of all sound morality and the laws and instincts of nature itself, when it demands of the innocent the sacrifice of the great end of existence—all that makes existence desirable—for the contemptible purpose of preserving inviolate one of the hundred means for the accomplishment of that end, or for the yet more ignoble purpose of ministering to the prejudices of a mistaken zeal in the cause of philanthropy.

"Happiness may be destroyed in various ways—by infliction of bodily pain and my mental infliction. Life may be made intolerable to the sensitive mind by the vile tongue of slander, by the thousand modes which the ingenuity of malice finds to manifest its fiendish nature and send its shafts to reach and fester among the weaknesses of our nature. These are more numerous than the bodily 'ills which flesh is heir to.' The sufferings of the mind are a thousand times more intolerable than the pains of the body. With such force did this truth strike the ancients that the most respectable sect of philosophers among them—the Stoics—discarded bodily pains from among the ills of life, and made mental suffering the greatest ill. * * *

"The ancient Romans admitted of divorce on too slight grounds. The abuse of this privilege disgusted the early Christians, who, as was natural, fell into the opposite error. The Catholic Church, which prevailed throughout Europe during the middle and dark ages, forbid divorce; but the Reformation originated a more sound philosophy on this subject, which has gradually enlarged the grounds for divorce in general in exact ratio with the spread of a liberalized Christianity and a more thorough understanding of human rights."

This old time Texas lawyer referred to the ancient tyrant, who, as a refinement in cruelty, was "accustomed to attach to the person of every malefactor a dead human body, that he might ever have beneath his vision its gradual and loathsome decay, and have its

fetid stench forever in his nostrils." And then, by way of comparison, he said that more refined in cruelty than the ancients is the power that would tie a loathsome moral carcass to the body of an innocent and feeble woman, "where she may forever inhale the moral pollution as it arises rank and fetid from the corrupting mass."

Alighting from Moving Train While Carrying Whiskey as Contributory Negligence.—In Louisville & N. R. Co. *v.* Dillrun, 178 Ala. 600, 59 So. 438, an action against a carrier for the wrongful death of a passenger, it appeared in evidence that the intestate, an aged man, between 65 and 75 years old, lame in one arm or shoulder from a Civil War wound, also lame in one leg, and in an enfeebled condition, while encumbered with bundles or packages, consisting of two quarts of whiskey, bananas, etc., which he carried in a sack or sacks, stepped off of a moving train against the protest of defendant's flagman who offered to stop the train. The Supreme Court of Alabama held that it was reversible error to refuse an instruction that the plaintiff could not recover if the jury believed such evidence. The requested instruction told the jury that in such case the intestate assumed all risk of injury. This seems inaccurate. The doctrine really invoked was that of contributory negligence, which is the failure to exercise that degree of care which a man of ordinary prudence would exercise under like circumstances. It may be safely asserted that the average citizen in this Commonwealth would not be reckless enough to alight from a moving train with even one quart in his possession (in the absence of pursuit or circumstances creating an emergency) not to mention the intestate's physical handicap.

The Faithful and Eccentric Mule.—In Stewart *v.* Smith, 78 So. 724, 725, the Court of Appeals of Alabama, per Bricken, J., said: "The characteristics and propensities of the faithful but eccentric mule are sufficiently well known for us to say that a body and mind at have become overwhelmed by the effects of alcohol are in no condition to foil such animal's fancies, or to curb its sometimes disastrous ambitions."

Mouse as an Article of Diet.—In these days of food conservation we naturally attach considerable importance to any decision of our courts which tends to establish or to clarify the law as to what is, or is not, a proper article of diet. We have therefore read with considerable interest a recent decision of the Appellate Division of the First Department, which establishes as the law of this State that mouse can not be regarded as proper food for a human being. Barrington *v.* Hotel Astor Company, Inc., N. Y. Law Journal, July 23,

1918. The distressing circumstances out of which the litigation arose are stated by Justice Dowling, delivering the opinion in which all of the justices concurred, as follows:

"On August 3, 1916, the plaintiff registered as a guest at the Hotel Astor, in the city of New York, at about 4 o'clock in the afternoon, and at about 8 o'clock in the evening went into the restaurant of the said hotel and gave an order for liquor and for food, which included kidney saute. After the lapse of some time the food ordered was brought to him, and after he had eaten part of the saute and was about to transfer some more from the casserole in which it was contained to his plate he found half a mouse included in the part so transferred and the other half still in the casserole. The mouse gave evidence of having been chopped in two, and as soon as the plaintiff discovered the unexpected addition to his order he became violently sick and remained so for some weeks, and suffered illness and other discomforts as the result thereof, including a pronounced loss of appetite."

The defense was ingenious. The defendant did not deny the presence of the mouse in the saute, but devoted its efforts to showing that the only possible explanation was that plaintiff who was an actor and who was at the time seeking employment in the moving picture business, had really placed the mouse in the dish himself, or hae so acted after having brought the mouse in with him as to cause it to appear that he had taken it from the dish. Difficulty was encountered in determining whether or not the mouse, when found in the dish, was "cooked or in its natural state," mainly for the reason that one of the defendant's waiters ate the remainder of the saute before his attention was drawn to the additional ingredient therein, and the waiter was unable to testify whether or not he ate any remaining part of the mouse. It did not appear that the waiter suffered any ill results from his feast. The jury found, upon the conflicting evidence, that the mouse was in the dish when it was placed before the plaintiff and had been in some way introduced therein during the progress of the food in the defendant's kitchen. The trial judge, however, disregarded the verdict of the jury, and dismissed the complaint for the reason that in his opinion there was no implied warranty that the food served to plaintiff was wholesome and contained no substance unsuitable for food, or that it was the food ordered.

The Appellate Division was of different opinion, nor did it apparently consider the abstract question of the wholesomeness of the mouse as important, but disposed of this aspect of the case very briefly, as follows:

"While neither of the medical experts produced testified that the flesh of a mouse is dangerous to health when eaten, yet the prejudice which still exists against that form of food sufficiently explains

the consequences which ensued to plaintiff from his consumption of it."

The view of the higher court was that Race *v.* Krum, 222 N. Y. 410, which has been recently discussed in Bench and Bar (12 Bench and Bar, New Series, 506, April, 1918), was a controlling authority. After reviewing that case the Appellate Division said:

"The hotel itself prepared this dish and has sole control thereof from the selection of the uncooked ingredients to the final placing of the prepared food before the plaintiff for consumption. A guest at a hotel who orders a portion of kidney saute has the right to expect, and the hotelkeeper impliedly warrants, that such dish will contain no ingredients beyond those ordinarily placed therein. The hotelkeeper also impliedly warrants that the dish is wholesome and fit for human consumption, and contains nothing rendering it unsuitable for use as human food. The defendant does not seek to justify the inclusion of the mouse in this dish as any proper part of its menu."

Considerable significance must be attached to this further thought of the Appellate Division:

"In a reputable hotel the guest has a right to assume that the food which is placed before him is fit for him to eat. That is why he pays the charges which are prevalent in restaurants of any standing."

We confess to a considerable degree of satisfaction with this decision, for our sympathies incline most strongly to the unfortunate plaintiff. We have heard tales of the stranded actor being reduced to severe straits, but we do not believe that his misfortunes should be aggravated by having to pay first-class hotel prices for a mouse saute.

We shall follow the future progress of this case with considerable interest, for it presents some unusual questions.

Is a mouse a proper article of food? While we are told that the Chinese eat them, the Court of Appeals of Georgia has called attention to "that mental aversion which the Aryan race instinctively entertains to ratty nourishment" (Martin *v.* Waycross Coca-Cola Bottling Co., 18 Ga. App. 226, 228), and our Appellate Division has referred, in the Barrington case, to the prejudice against that form of food. In this aspect of the case it seems to us that the doctrine of free-will clearly entitles one to determine for himself whether or not he will partake of mouse.

We are also interested in the elements of damages. The court states that the plaintiff in this case suffered "a pronounced loss of appetite." Is this a proper element of damages, or could the defendant, in view of the fact that the plaintiff was an actor out of employment, base a counterclaim thereon as for a benefit conferred?

The question of mental anguish is involved. Would one suffer

mental anguish as the result of eating a mouse, or something which was flavored with dead mouse? And would such mental anguish be a proper element of damages? On this we have direct authority. In Martin *v.* Waycross Coca-Cola Bottling Co., 18 Ga. App. 226, the court delivered itself of the following:

"While under the rule announced in the Georgia case of Chapman *v.* Western Union Telegraph Co., 88 Ga. 763 (15 S. E. 901, 30 Am. St. R. 183, 17 L. R. A. 430), one could not recover for mental anguish due merely to extreme delicacy of taste or to wounded feeling caused by the consciousness of having swallowed a liquid in which a dead mouse was in process of dissolution, or for nausea produced entirely by that mental aversion which the Aryan race instinctively entertains to ratty nourishment, there is evidence from which the jury could have inferred that in this instance the liquid, which was a blend of Coca-Cola and putrid mouse juice, of itself caused the sickness from which the plaintiff testified she suffered and that she would have been made sick by it even if she had not seen that there was a decaying mouse in the bottle. She testified that she took a large swallow before she saw the mouse; and it is not, as a matter of law, to be concluded that the nausea from which she suffered was due to the mental shock caused by seeing a dead mouse in the liquid she was imbibing, rather than that the nausea, sickness and pain were primarily due to the poisonous nature of the hideous brew, which her physical nature revolted against and attempted to expel without her mind consciously becoming a collaborator in the effort and before the mind became a participant in the suffering." 18 Ga. App. 228.

We think that if such a case ever got to the jury they would be fairly certain to take the mental anguish of the plaintiff into consideration, and the court would be reluctant to upset their verdict. Note the following language of the Georgia court:

"We apprehend that the learned trial judge regarded the case as one in which the only suffering endured by the plaintiff was mental pain consequent upon the discovery of a rotten mouse in the bottle of Coca-Cola from which she was drinking. If the evidence was subject to no other construction, his judgment would undoubtedly be correct, under the decision in Chapman *v.* Western Union Telegraph Co., supra, but it is clear to our minds that there was sufficient evidence, in due accord with the petition to have authorized a jury to find that the physical sickness and physical pain of the plaintiff were caused by the physical effort to repel a poisonous fluid; and for this reason we hold that the court erred in awarding a nonsuit. If the plaintiff after having swallowed an unnatural and deleterious compound, which necessarily was injurious to her body and which caused physical pain and sickness, to her damage, suffered additional mental pain, which was consequent and directly depend-

ent upon her physical suffering, this would merely aggravate the injury." 18 Ga. App. 229, 230.

"In our opinion, while the evidence in the present case perhaps does not *require* a jury to find that the nature of the liquid sold by the defendant and swallowed by the plaintiff was the proximate cause of physical suffering and injury to her person, it is sufficient to *authorize* such a finding." 18 Ga. App. 229.

In any event, the inadvertent mouse-eater need not be made critically ill in order to recover damages.

"The fact that a particular plaintiff was sick only a short time, or that no critical illness resulted from the negligence of the defendant, might minimize the damages recoverable, but it would hardly so bring the case under a maxim de minimis non curat lex as to deprive the plaintiff of a right to recover. That the plaintiff was cured of the effect caused by the rodent whose ghastly condition is portrayed in the testimony does not necessarily make this a case in which the Latin 'curat' is synonymous with cure rat, or rat cure." 18 Ga. App. 229.

It is possible, though hardly probable, that such a case might involve a dispute as to the ownership of the dead mouse. The general rule is that the sale of a thing which, without the knowledge of the seller, contains something else concealed in it is not a sale of the latter thing. 35 Cyc. 61. The defendant hotel vigorously denied any intent to confer the mouse upon the plaintiff; and hence, if the mouse be regarded as a domesticated animal belonging to the hotel, it seems clear that the hotel did not pass title to the plaintiff by unwittingly including this household pet in the saute. The hotel's claim of continued ownership of the mouse, notwithstanding its post-mortem adventures, would find further support in the case of Wiley *v.* Slater, 22 Barb. 506, 510, in which it was said, obiter, that where two dogs fought and one was killed, "the owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor." If, however, the mouse, while in life, was in its untamed state, not reclaimed or domesticated by the hotel, it would seem that plaintiff could assert title under the doctrine that "findin's is keepin's," relying upon Doodeward *v.* Spence, 6 Commonwealth Law Rep. 406, where the High Court of Australia said that "the dead body of an animal feræ naturæ is not at death the property of anyone, but may be appropriated by the finder."

Another question is how much care should one exercise to make sure that he does not partake of dead mouse. This question was presented in the leading mouse case of Jackson Coca-Cola Bottling Co. *v.* Chapman, 106 Miss. 864, where counsel for the defendant-appellant earnestly argued:

"We object to the instructions given in favor of appellee. The

first instruction as shown on page 88 says in effect that if the jury believe that the beverage was bottled by defendant and placed on the market for sale while containing a dead rat, the plaintiff was made sick by drinking, then the verdict should be for the plaintiff. Our objection to this instruction is that it leaves out of consideration the fact that the plaintiff should have exercised proper care at the time when drinking. Certainly some obligation and requirement of prudence must rest upon the plaintiff in a case like this.

"There is no limitation in instruction to show that plaintiff himself should have exercised reasonable care and caution. Suppose that in this case the plaintiff knowingly bought the stuff and drank it, and so was made sick thereby, should there be a recovery? Suppose that the plaintiff willfully bought the concoction and got sick as a result, should the jury award the verdict for the plaintiff?" 106 Miss. 865-866.

This argument does not impress us, nor did it appear to impress the court very strongly, for the case was disposed of on its general merits as follows:

"A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin', tim'rous beastie' drowned in a bottle of Coca-Cola. How it happened is not told.

"There is evidence for appellant that its system for cleansing and filling bottles is complete, and that there is watchfulness to prevent the introduction of foreign substances. Nevertheless the little creature was in the bottle. It had been there long enough to be swollen and undergoing decomposition when the bottle was purchased from the grocer and opened by appellee. Its presence in the bottle was not discovered until appellee had taken several swallows. An odor led to the discovery. Further events need not be detailed. Appellee says he got sick. Suffice it to say he did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

'The best laid schemes o' mice an' men
Gang aft aglay
An' lea'e us nought but grief an' pain
For promis'd joy!'

"The record discloses sufficient evidence to sustain the jury's verdict for appellee." 106 Miss. 868-869.

All these questions are novel, and we await their solution with interest although we hope most fervently that the New York restaurateurs will so conduct themselves that we shall not need a binding precedent establishing the rights and liabilities arising out of feeding mice to inadvertent guests.—Bench and Bar.